

UNITED STATES
v.
ERNEST C. DOWNS AND
GOLDFIELD DEEP MINES COMPANY OF NEVADA

IBLA 79-266, 79-289

Decided January 29, 1982

Appeals from decision of Administrative Law Judge Dean F. Ratzman declaring one placer and nine lode mining claims null and void.

Affirmed.

1. Mining Claims: Determination of Validity--Mining Claims:
Discovery: Generally

For a mining claim to be valid there must be a discovery of a valuable mineral deposit within the limits of the claim. There has been a discovery where minerals have been found in sufficient quantity and of sufficient quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine.

2. Mining Claims: Discovery: Generally

The "prudent man test" is met generally where it appears that mineralization on the claim has been physically exposed and evidence shows the mineral deposit is valuable enough to yield a fair market value in excess of the costs of extraction, removal, and sale. Evidence of mineralization which would justify further exploration, but not development, does not suffice to meet the discovery requirement.

3. Administrative Procedure: Burden of Proof-- Administrative
Procedure: Hearings--Mining Claims: Contests

When the Government contests a mining claim on a charge of lack of discovery

of a valuable mineral deposit, it has assumed the burden of going forward with sufficient evidence to establish a prima facie case. Where a Government mineral examiner testifies that he has examined a claim and found the quantity of minerals insufficient to support a finding of discovery, a prima facie case of invalidity has been established and the burden shifts to the claimants to show by a preponderance of the evidence that a discovery has been made. Government mineral examiners are not required to perform discovery work for a claimant or to explore beyond a claimant's workings.

4. Administrative Procedure: Hearings--Mining Claims:
Contests--Mining Claims: Hearings--Rules of Practice: Hearings

A mining claim contest hearing will not be reopened to afford the claimants an opportunity to prove a discovery had been made on the claims in the absence of a tender of proof and evidence to show equitable justification for a further proceeding in the case. Also, the case will not be reopened where the Administrative Law Judge has ruled on the credibility of claimants' witnesses on issues going to their failure to present a case due to alleged Governmental interference, which is not supported by the record, and there is no persuasive showing of a denial of due process.

APPEARANCES: William B. Murray, Esq., Portland, Oregon, for appellant Goldfield Deep Mines Company of Nevada; Ernest C. Downs, *pro se*; Charles F. Lawrence, Esq., Office of General Counsel, Department of Agriculture, for the Government.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Goldfield Deep Mines Company of Nevada (Goldfield) and Ernest C. Downs appeal from the February 14, 1979, decision by Administrative Law Judge Ratzman holding 10 mining claims null and void. 1/ The decision

1/ The claims are: The Atlasta placer mining claim, situated in sec. 26; and the Ricky-Bill, Ricky-Bill Extension #1, Ricky-Bill Annex "A," Ricky-Bill Annex "A" Extension #1, Ricky-Bill Annex "A" Extension #2, Ricky-Bill Annex "A" Extension #3, Brag, Brag Extension #1, and Brag Extension #2, situated in secs. 25, 26, 27, 34, and 35: all in T. 2 N., R. 6 W., San Bernardino meridian, San Bernardino County, California.

was the result of contests brought by the Bureau of Land Management (BLM) on behalf of the Forest Service (FS) to determine the validity of the mining claims. Because there was a dispute over ownership of the claims, similar complaints were issued against both Goldfield and Downs, adversary claimants of the lands, alleging, *inter alia*, that there has been no disclosure of minerals on the claims sufficient in quantity, quality, and value to constitute a discovery. Both contestees denied the allegations, and consolidated hearings were held on October 12 through 14, 1977, and January 10 through 12, 1978, in Riverside, California. The claims were located in 1954, 1962, and 1963, and were alleged to be valuable because of gold, silver, platinum, and tungsten deposits. Judge Ratzman found there was not a discovery of a valuable mineral deposit within any of the claims.

In its lengthy statement of reasons for appeal Goldfield asserts generally it was denied due process because of an *ex parte* communication to the decision maker, and because its motion for permission to sample the mining claims to replace destroyed proofs was denied. It argues that the decision is not based on substantial evidence, that the land is mineral in character, and that valuable mineral deposits have been discovered on each of the ten claims. Goldfield further states that FS failed to make a *prima facie* case of no discovery on any of the ten mining claims, and that the FS mineral expert based his opinion on a misconstruction of the prudent man rule. Finally, Goldfield urges FS should be estopped from challenging the claims because FS acted unfairly in removing the contestees' equipment and records prior to making a determination of the validity of the claims.

Contestee Downs argues on appeal that he did not point out places for FS to sample because Goldfield denied him access to the claims. He alleges the U.S. Attorney, pursuant to a court order, caused the removal of equipment belonging to him from the claims and sold it even though Downs informed them the equipment was his rather than Goldfield's. Downs states that even after the California State court quieted title in him, Judge Ratzman continued the consolidated hearing of these contests. He asserts that he offered to go to the claims with the FS mineral examiner at the time of the hearing to point out his discoveries but his offer was refused. He further asserts that he did uncover valuable mineral deposits before Goldfield entered the claims, that he has a chemist who will testify to the mineral values, and that under the 1872 mining law a mining claimant has the right to possession and enjoyment of the claims.

The contestant declined to respond to Goldfield's statement of reasons but did address the points raised by Downs. Contestant states that Downs' reasons for appeal generally "object to incidents of the court litigation" which are not relevant to this contest. Contestant asserts that any shortcomings in consultation between the Government and Downs "could easily have been overcome by exercise of the privileges accorded him to cross-examine the Government's witnesses and to offer testimony in his own behalf."

On July 6, 1978, Downs requested a rehearing. He stated that a Government geologist and Mr. Lawrence, the attorney for contestant, told him he need not present evidence at the hearing, but had only to present a plan of operation and he would be permitted to mine. He asserts that had he not relied on these statements by contestant's employees, he would have presented such evidence at the hearing.

Contestant responded to this request, asking that it be denied because it is not based on fact and because it was made 21 months after the initiation of the hearing. Contestant asserts that Downs absented himself from the claims and the initial stages of the hearing on the advice of his own counsel (Tr. 20-21), not that of any Government personnel, and that Downs was unknown to contestant's attorney, Mr. Lawrence, until the hearing was under way.

Before ruling on these contentions of the appellants we shall set forth the general principles of law pertaining to mining claim validity determinations and discuss the most pertinent facts.

[1] For a mining claim to be valid there must be a discovery of a valuable mineral deposit within the limits of the claim. 30 U.S.C. §§ 22, 23 (1976); 43 CFR 3811.1. There has been a discovery where minerals have been found in sufficient quantity and of sufficient quality "that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine." Castle v. Womble, 19 L.D. 455, 457 (1894). This "prudent man test" has been repeatedly approved by the Supreme Court and in Departmental decisions. E.g., Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963); Cameron v. United States, 252 U.S. 450 (1920); Chrisman v. Miller, 197 U.S. 313 (1905); United States v. Burns, 38 IBLA 97 (1978); United States v. Becker, 33 IBLA 301 (1978); United States v. Arcand, 23 IBLA 226 (1976).

[2] The "prudent man test" is met generally where it appears that mineralization on the claim has been physically exposed and the evidence shows that the mineral deposit is probably valuable enough to yield a fair market value in excess of the costs of extraction, removal, and sale. United States v. Edeline, 39 IBLA 236 (1979); United States v. Kiggins, 39 IBLA 88 (1979); United States v. Melluzzo, 38 IBLA 214 (1978). Evidence of mineralization which would justify further exploration, but not development of a mine, does not suffice to meet the discovery requirement. United States v. Edeline, supra.

[3] When the Government contests a mining claim on a charge of no discovery, it has assumed the burden of going forward with sufficient evidence to establish a prima facie case. The testimony of a Government mineral examiner that he has examined the claim and found the mineral values insufficient to support a finding of discovery establishes the prima facie case and shifts the burden to the claimant to show by a preponderance of the evidence that a discovery has been made. Government

mineral examiners are not required to perform discovery work for a claimant, or to explore beyond a claimant's workings. United States v. Burns, *supra*; United States v. Arcand, *supra*. See also United States v. Zwiefel, 508 F.2d 1150 (10th Cir. 1975); United States v. Springer, 491 F.2d 239 (9th Cir. 1974); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). It is the claimant who bears the risk of nonpersuasion. Foster v. Seaton, *supra*; United States v. Arcand, *supra*; United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975).

At the hearing, James R. Mason, Jr., a FS mining geologist, testified for the contestant. Mason has a masters degree in geology from Iowa State University and worked as an exploration, evaluation, and production geologist for several major companies and the Geological Survey before joining the FS in 1972 (Tr. 29).

Judge Ratzman summarized Mason's testimony as follows:

Mr. Mason initially inspected the claims on May 28, 1976 with Frank Montgomery and Howard Ogden, representatives of Goldfield Deep Mines. He later made a three-hour observation from a helicopter on November 24, 1976. Other inspections were made on December 1, 6, 8 and 9, 1976. He returned to the claims on September 6, 27 and 30, 1977 and October 11, 1977. Tr. 69. Mr. Mason was unable to determine where the claim boundaries were. None of the claim corners or boundaries were pointed out for him by the contestees. Tr. 69.

The claims are in a mountainous area which has very dense and thick vegetative growth on steep slopes that range up to 5200 feet in height. See Ex. 9. The slopes are very difficult to traverse. The general geology of the area is comprised of metasedimentary and granitic rocks. Tr. 70. There is an access road to the claims on the eastern side of the area. Access to the western claims requires a great deal of effort.

In describing the workings on the claims which he observed prior to the removal of Goldfield's mining equipment, Mr. Mason stated that he believed most of the work was done by the preceding owners of the claims. Tr. 71. Also, most of the material mined was alluvial in nature. There were several bulldozer roads on the Atlasta and Ricky-Bill claims. Tr. 72, Ex. 9. A small pond was excavated on the Atlasta claim. Tr. 73. There is an old caved and abandoned adit near the old pond. See Ex. 10. Mr. Mason also observed a quartz crusher, a conveyor belt and a mill on the Atlasta claim. Tr. 74. Numerous old automobiles and trucks that were in disrepair were scattered near the mill area. An old bus which had been converted to a trailer was also on the claim.

A search of the area made from a helicopter on November 24, 1976, did not reveal any claim corners or workings on the claims. Tr. 75, 96. There was a small rock pile found on the Ricky-Bill Annex A Extension 1. Ex. 9 & 14. However, there were no identifying marks or papers on the rock pile. Tr. 76. The rock pile was the only man-made development on the claims except those found on the Atlasta claim and previously mentioned. Tr. 76. Mr. Mason felt his helicopter searches and onsite examinations were thorough and comprehensive. Tr. 96.

During an examination of the claims on May 28, 1976, Mr. Montgomery and Mr. Ogden (Goldfield representatives) pointed out four areas from which Mr. Mason took samples. The areas sampled are on the Atlasta placer claim. Tr. 78, Ex. 10. Mr. Rebenstorf, the President of Goldfield Deep Mines Company, did not give Mr. Mason any information relating to sampling points. Tr. 79. Mr. Downs did not disclose any areas to sample. Tr. 80. On December 6, 8 and 9 of 1976, 28 more samples were taken. Mr. Mason took these samples from areas where there had been prospecting by the contestees. He selected locations that had the best potential for mineralization and also sampled every exposure made by the contestees. Tr. 79, 184. Because the results from Mr. Mason's samples were so negative, he did not do any sampling elsewhere on the claims. Tr. 81.

The samples were sent to Metallurgical Laboratories Inc., in San Francisco for assay and spectrographic analysis. A fire assay was made for gold and silver while another analysis was made for tungsten and platinum. Tr. 84. The placer sample was amalgamated for gold and the black sand concentrate was fire assayed. A spectrographic analysis was made on several rock composites in an attempt to discover any other minerals that would be of commercial interest. The results of this analysis did not indicate the presence of minerals with commercial value. Tr. 86.

Based on the assay results from samples he took, Mr. Mason concluded that a commercial operation on the claims would not be feasible for tungsten or gold values. Tr. 88. He discussed the requirements for a commercial heap leach operation. Conditions for such an operation must be ideal. If the mine is a small operation producing 25 tons per day, the minimum amount required would be .10 oz. of gold. If environmental costs are added, .20 oz. of gold would be the cut-off grade. Tr. 90.

Mr. Mason contended the claims in dispute do not have ideal conditions that would make them worth developing. He asserted environmental considerations would have

to be carefully monitored, particularly because ground water for several communities is gathered from the immediate area of the claims. He stated, "Of course if you talk about transporting off the property, those values would not pay for the transportation costs." Tr. 91. In his opinion his sampling methods and examinations of the claims would be commercially developed. Tr. 91. Alluding to the prudent man standard, Mr. Mason concluded that no one would be justified in expending time, money and effort on these claims with a reasonable expectation of developing a paying mine. Tr. 95.

Mr. Mason believes that the helicopter inspections were more effective than ground searches because of the terrain and the vegetation on these claims, which encompass a total of about 235 acres. Tr. 97.

(Decision at 2-4).

On cross-examination Mason stated that in situ leaching is not being done on a commercial basis for gold and silver, and is not a proven process for mining gold (Tr. 99, 200). He testified that he took only one placer sample from the Atlasta placer claim because the contestee "never indicated there were valuable placer materials present. Tr. 111" (Decision at 4). Fire assaying, according to Mason, is standard procedure for gold (Tr. 119). As the Judge further stated:

Mr. Mason confined his examination and sampling to the area shown on Exhibit 9-C because the claimant (representatives of Goldfield) would not cooperate. Tr. 139. Since he did not find any evidence of development on the western claims and his helicopter traverses did not reveal any geologic indications of mineralization, he found it useless to make a physical inspection of them. Tr. 173.

In Mr. Mason's opinion, the claims are in an area which is not large enough nor has it the sufficient slope to permit in situ leaching. Tr. 202. Since the values uncovered are so minimal, Mr. Mason did not do any core drilling to determine the porosity and permeability of the ground underneath the claims. Tr. 202. The dip of the beds is highly variable and contorted. Tr. 131, 134. He concluded that the claims have no commercial value today. Tr. 207.

(Decision at 5).

Contestant Goldfield called numerous witnesses to testify in its behalf. A previous owner of the claim, Delphine E. Holecek, testified

that she and her husband mined gold from the Atlasta placer (Tr. 219). A retired carpet layer who has prospected in the vicinity, Maurice Copenhagen, gave testimony Judge Ratzman termed "generally inconclusive with respect to the issues in the proceeding. Tr. 235-262" (Decision at 5).

Duane Wilkinson, a "'completely self taught' assayer who has been going to night school one day a week for the last six years" (Tr. 324) testified to gold and tungsten values on the claims (Decision at 6). He was unable to supply details concerning the size of his samples and where they were taken. Wilkinson used a chemical, or wet, assay (Tr. 326) and conceded that his methods "cannot accurately measure gold down to a fraction of a milligram" (Decision at 6).

The superintendent of Goldfield, Howard Ogden, had 18 years of mining experience. Judge Ratzman summarized his testimony as follows:

Mr. Ogden concluded that when results of fire assays and chemical assays are compared "chemical is by far the best." Tr. 280. Mr. Ogden was in the trucking business prior to his association with Goldfield Deep Mines which began in 1975. His formal training in mining is limited, but he has taken several correspondence courses. Tr. 284. He owns 100 shares of Goldfield stock. Tr. 288.

Mr. Ogden contends he has sampled the claims frequently both for placer and lode values. Tr. 289. He estimated he took somewhere between 4,000 to 1,000,000 samples but he did not have records to verify this. He asserts that the Government and local authorities took or destroyed some of his records. Tr. 289. He could not recall the dates when he took samples. He also alledged he had drilled core holes on the claims but said that the records indicating their location had been destroyed. Tr. 295. The holes were drilled after Mr. Mason had initially inspected the claims in 1976. Tr. 297. Mr. Ogden claims the holes were drilled in preparation for in situ leaching. The holes were two and three-fourths inches in diameter and ranged from 50 to 400 feet in depth. He towed the drilling equipment up to the claims with a bulldozer. Tr. 298. A 104 pound jack hammer was used to drill the holes. He used 10-foot lengths of drill rod to get to a depth of about 400 feet. Tr. 299. He carried these drill rod sections up to the claims by hand. Samples were taken from the drillings. The drill holes were unmarked because he didn't want anyone to discover he was going to use in situ leaching to recover valuable minerals. Tr. 315. Mr. Ogden collected all the materials from the drillings and placed them in cloth sacks. He mixed all the samples from the different drill holes together because he felt the

samples were from the same strata of material. Tr. 309. The sample sent to Handy and Harman represented samples taken from twelve different drill holes. Tr. 310. He collected only samples of material that he had examined under microscope or that he was interested in. Other materials from the holes were discarded. Tr. 312. He did not save any material from the first 10 feet of drilling. There is no way to determine how much material was obtained from a given drill hole. Tr. 314.

Mr. Ogden contends all the Wilkinson assay materials (Ex. A, B, C & D) were taken from the Ricky-Bill Extension 1 and the Ricky-Bill Annex A claims. Tr. 387. In his view the samples were taken out of one vein (vein number 5) that ran through the two claims, although from different locations. He and Mr. Wilkinson had an agreement that Lytle Creek materials would be chemically assayed. Fire assays could not be utilized successfully. Tr. 390. Mr. Ogden concedes that he cannot state exactly where the samples assayed by Wilkinson reports were obtained. Tr. 398. He could not recall whether the samples were taken from core drillings or open exposures. Tr. 400. Mr. Ogden also confessed he purposely concealed the core drill holes by stuffing them. He declared, "I did not want anybody to find those holes at that time because of what I discovered there." Tr. 401.

Mr. Ogden delivered the samples that he took from the claims to Mr. Rebenstorf. Mr. Rebenstorf would decide what material from the samples were to be assayed. Tr. 410. When large samples were taken for assaying to Mr. Wilkinson the latter would select a smaller quantity for testing -- "what he thought was the best." Mr. Ogden stated he selectively sampled different areas based on his own mining experience. Tr. 411. Mr. Ogden admitted that the locations from which he took samples could not be accurately pointed out on exhibits prepared by the contestant. He ultimately acknowledged that "much of this information I have given here is not correct because of where the location should actually be." Tr. 422. He asserted he had to adjust his testimony to conform to the claim boundaries depicted on the contestant's exhibits which are not the same as those which he had relied upon. Tr. 422.

An undated engineer's report on two undesignated claims in the Lytle Creek area estimated 1.1 million tons of ore that contained precious metals. Ex. K. Mr. Ogden maintains he prepared this report in July 1976 for Goldfield Deep Mines. Tr. 476. He also estimated 1.5 million tons of ore reserves on the Atlasta placer claim. He had no other

records to verify this engineer's report. Tr. 477. It is Mr. Ogden's opinion that a prudent man would spend time and effort in developing the contested claims. Tr. 517.

On Cross-examination, Mr. Ogden could not specify to what extent the veins discussed in his engineer's report are on the Ricky-Bill, Ricky-Bill Extension and Ricky-Bill Extension Annex A. Tr. 523. Nor could he estimate the tonnage of ore that may lie on each of these claims. The greatest bulk of the veins and of the tonnage would be on the Ricky-Bill Extension and the Ricky-Bill Extension Annex A. He contends that all the assay reports that have been submitted by the contestees relate to all the claims but they do not refer to any single claim. Tr. 525. He could not refer to any assay report concerning the 1.5 million tons of material on the Atlasta placer claim. Tr. 529.

Certain methods of Goldfield Deep Mines for concentration or extracting ores are secret -- Mr. Ogden would not provide information relating to those methods. Tr. 540.

Mr. Ogden has never seen in situ leaching in practice, and he acknowledges that it is in the experimental stage. Tr. 568. His determinations as to use of that process on the contested claims are incomplete. Tr. 569. His drilling work on the claims was to determine if in situ leaching is feasible. In January, 1978, he was working on a design for a closed circuit in situ leach. Tr. 574.

(Decision at 7-9). Mr. Ogden asserted that most of his records were confiscated and/or destroyed by the Government.

Goldfield employed Daniel Ferris, who has a degree in biochemistry and some background in mining and assaying, as a consultant. He sampled the claims in March 1977 and believes the claims are valuable for platinum (Tr. 607). He stated that they are a "developing prospect" (Tr. 617). Ferris owns stock in Goldfield, and believes a prudent man would spend time and money developing these claims (Tr. 721).

Frank Montgomery, Vice President of Goldfield, "conceded the exploratory work for the claims has not been completed, but contends that Goldfield was at the development stage for two veins. Tr. 678, 693. Six months of additional work is needed on the contested properties" (Decision at 10). He admits that the type of mining Goldfield would engage in had not been finalized (Tr. 679).

The President of Goldfield, John Rebenstorf, testified that the company had \$350,000 worth of mining equipment on the claims (Tr. 846).

He admitted that Goldfield has not filed a plan of operation with FS and had not finalized any plans, although in situ leaching and open pit mining were being considered (Tr. 849).

Judge Ratzman stated:

In rebuttal, Mr. Mason testified he contacted Galen G. Waddell of the Bureau of Mines, Twin Cities Research Center, and inquired about the feasibility of in situ leaching. Tr. 1042. A letter from Mr. Waddell states that no such research was being conducted for in situ leaching and they were not aware of any commercial in situ leaching operations. The Research Center has no published information concerning in situ leaching for gold. Ex. 36.

(Decision at 12).

Goldfield called two adverse witnesses. Eugene L. Pierce, special agent for the FS, accompanied Mason during several of his visits to the claims along with several FS employees and two San Bernardino County deputy sheriffs (Tr. 768). Pierce's purpose in going with Mason was to keep the peace (Tr. 784). He testified that Rebenstorf initially refused to allow them to sample the claims (Tr. 769). Downs was also called as an adverse witness. He testified that his assays "disclosed values ranging from one cent a ton to \$1000 a ton" (Tr. 828). Records of these assays were left in a toolhouse that was taken over by Goldfield Deep Mines (Tr. 829) (Decision at 10). Downs called no witnesses to the stand in his own behalf, made little use of his right to cross-examine adverse witnesses, and submitted only two exhibits.

In evaluating a mining claim, the Government mineral examiner has no duty to explore beyond the current workings of a claim. It is incumbent upon the mining claimant to keep discovery points available for inspection. United States v. Smith, 54 IBLA 12 (1981); United States v. Slater, 34 IBLA 31 (1978); United States v. Conner, 31 IBLA 173 (1977). The testimony of Mason was sufficient to establish a prima facie case of no discovery and shifted the burden of proving the existence of a discovery on each claim to contestees. Mason sampled the contestees' workings and exposures and inspected the claims on foot and by helicopter. The claimants failed to point out any deposits for sampling on the nine lode claims (Tr. 139).

To meet their burden of proof to overcome the contestant's prima facie case of lack of discovery of a valuable mineral deposit on each claim, contestees must show by a preponderance of evidence that within each claim there is mineral of such quality and quantity that a person of ordinary prudence would be justified in the further expenditure of time and money with a reasonable prospect of success in developing a paying mine. We agree with Judge Ratzman that the evidence presented fails to make the required showing. Because they are unsupported by

evidence as to how and where the samples were taken, the contestee's assay reports have limited probative value. United States v. Kuretich, 54 IBLA 124 (1981); United States v. Porter, 37 IBLA 313 (1978); United States v. Nicholson, 31 IBLA 224 (1977).

It is well settled that geologic inference alone cannot support a finding of discovery, e.g., United States v. Walls, 30 IBLA 333 (1977), and contestees have failed to show that a valuable mineral deposit has been exposed. Judge Ratzman correctly analyzed the evidence as follows:

The case made by Goldfield Deep Mines is no better than Mr. Ogden's samples and his sampling techniques, and he does not come off well in either area. The evidence discloses that his samples are mixtures of materials from different sample locations. Furthermore, the materials assayed were selectively chosen. He was secretive about the location of his sample sites, his methods for extracting and concentrating ores, and the basis for his engineering opinions. I do not believe some of his testimony -- for example, his assertion that he drilled holes as deep as 400 feet with a 104 pound jack hammer and ten-foot lengths of drill rod; also, his statement that chemical assays for gold and silver will disclose values which cannot be detected by a fire assay.

Mr. Rebenstorf gave a \$350,000 estimate of value for the company's plant, mining equipment and property removed or razed in March, 1977. The photographs and documents in the case record indicate that Goldfield's investment was in a much lower range. * * *

The reports submitted by two of the assayers selected by Goldfield Deep Mines are entitled to little or no weight. Mr. Wilkinson who utilized the chemical assay method, is self-taught. I must question whether reliance should be placed upon the work of a self-taught assayer, particularly one who assays for gold and silver by chemical means. It is questionable whether the samples assayed by PM Labs were taken and handled in a proper manner. Some of the tests by PM Labs for gold and silver were chemical assays. J and J Smelting and Refining seems to have performed the most reliable and professional assays for Goldfield. The report and recommendations of J and J Smelting are not optimistic (page 7, Exh. L). It has not been established that the sample submitted to J and J Refining was taken by a person with suitable qualifications and experience. This is a deficiency which extends to all of the Goldfield samples.

Mr. Ferris dealt in generalities concerning the nature and quantity of platinum and rare metals on the contested claims. He did say that the claims are valuable for platinum, and there is enough platinum to be of commercial

interest, and that the claims are a developing prospect (it should be noted that the wet assay test by Mr. Ferris, a graduate chemist, revealed no gold values). When all of the testimony by Mr. Ferris is reviewed it becomes apparent that he is still working on a system or process for the profitable recovery of platinum. A portion of the material that he assayed for platinum had been selected, crushed and screened by Goldfield, and some had been chemically treated.

(Decision at 15-16).

[4] Downs' contention that he did not have an opportunity to show the mineral examiner his discovery points would not, even if true, overcome his failure to introduce any evidence of his own to establish that a discovery had been made. United States v. Timm, 36 IBLA 316 (1978). He was given ample opportunity to submit evidence and actively participate in the hearing. He was given time after the hearing during which he could submit evidence. He has submitted no evidence of a discovery on these claims. He did not disclose any areas to sample to contestant's witness (Tr. 80). The circumstances surrounding this contest are unfortunate. However, there is no offer of evidence by Downs to indicate that a rehearing would alter the finding of the Administrative Law Judge. The record does not support his assertions. Therefore, his request for a further hearing is denied in the absence of a tender of proof and in the absence of evidence to show equitable justification for a further proceeding in his case.

The alleged hardships encountered by Goldfield in making its case were brought on by its refusal to comply with the regulations governing mining claims on National Forest lands. 36 CFR Part 2.52. The issue in these contests is the validity of the 10 mining claims. Goldfield's assertion that the Government should be estopped from challenging the claims must be rejected. The FS, in removing Goldfield's property from the claims, acted pursuant to an order of a United States district court. ^{2/} Furthermore, to rely on its "confiscated records," Goldfield must demonstrate that such records existed, and to do so requires a finding that the witnesses' testimony was credible. See United States v. Melluzzo, 32 IBLA 46 (1977). Judge Ratzman's opinion clearly shows his lack of belief of some of the testimony. He completely disbelieved some of Ogden's December 15 testimony. From the entire decision it is apparent he discredited much of Goldfield's evidence as being unreliable and unsupported by a proper foundation. On the estoppel question, he specifically concluded:

Taking into account (i) the parties have been (and perhaps still are) locked in battle in courts of general jurisdiction (ii) the Forest Service and Department of Justice have continuously and successfully advanced the

^{2/} The judgment of the district court in the trespass action in favor of FS against Goldfield was affirmed on appeal. United States v. Goldfield Deep Mines Co. of Nevada, 644 F.2d 1307 (9th Cir. 1981).

position that Goldfield Deep Mines has trespassed, violated California statutes, and refused to comply with Federal regulations, and (iii) that neither Mr. Rebenstorf nor Mr. Ogden is the type of person who would be easily intimidated, or dissuaded from proceeding with a course of action, I conclude that strong and direct actions on the part of Government employees should not be viewed as unreasonable. Some of the steps taken by the Goldfield officials were uncooperative and needlessly hostile. Goldfield simply has not established that it was in the right in its manner of occupation and use of the public lands involved in this contest. Indeed, the court rulings to date have gone against the corporation in almost every instance. In declining to invoke the doctrine of estoppel, I do not overlook the fact that in their testimony both Mr. Rebenstorf and Mr. Ogden resorted to gross exaggerations.

(Decision at 17-18).

In any event, any estoppel argument could not serve to substitute for proof that a discovery had been made. At most, it could only go to the question of whether the case should be reopened for further hearing to afford the claimant additional opportunity to prove discovery. We see no basis for disturbing Judge Ratzman's findings in this case. He was in the best position to observe the demeanor of the witnesses and make the best ruling on the credibility of their testimony. He weighed the evidence and gave little or no weight to the testimony of several of Goldfield's witnesses. The record shows no basis for overturning those findings based on lack of credibility.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Gail M. Frazier
Administrative Judge

We concur:

Bernard V. Parette
Chief Administrative Judge

Edward W. Stuebing
Administrative Judge

